AMARAN HJ ABDULLAH & ORS

v.

AMANAH RAYA BHD

HIGH COURT MALAYA, KUALA LUMPUR
ZURA YAHYA JC
[CIVIL SUIT NO: S4-22-184-2006]
11 DECEMBER 2009

TRUSTS: *Trustees - Breach of trust - Fiduciary obligation - Whether the beneficiaries under a duty to ensure trustee fulfils his obligation in the trust*

TRUSTS: *Trust property - Mixing of trust assets with trustee's personal assets - Whether this is sufficient evidence of misappropriation - Whether plaintiff is required to furnish additional evidence*

EVIDENCE: *Documentary evidence - Books of accounts - Section 34 Evidence Act 1950 - Whether additional evidence required to claim liability - Whether witness has to have personal knowledge of the entries in the accounts*

EVIDENCE: *Credibility - Witness unreliable - Witness present in court - Whether witness must exhibit familiarity with entries in trustee's accounts - Whether witness has provided proof of involvement in trustee's affairs*

CIVIL PROCEDURE: *Pleadings - Facts not pleaded - Failure to plead a defence - Whether facts not pleaded in the statement of defence can be raised during trial*

LIMITATION: *Administration action - Beneficiary's action for breach of trust - Commencement of time for limitation period - Section 22 Limitation Act 1953 -Whether limitation applies in breach of trust cases*

The plaintiffs were the beneficiaries of a trust of the estate belonging to one Haji Abdullah Mohd Zin. The estate properties were administered through a company owned by the trustee. The plaintiffs discovered that a sum was due and payable to them from accounts drawn up for the year 1992 to 2003. They made a claim for the sum due and payable to them under the trust. To prove their case, the plaintiffs produced witnesses who had knowledge of the dealings and transactions relating to the trust property and the records thereof.

The defendant disputed the contents of the accounts claiming that it was altered and rewritten. It was further contended that the plaintiffs were reckless in their conduct, as they did not make enquires to the trustee on the dealings of the estate properties. The plaintiffs did not put forward evidence that the accounts in question were for the purpose of managing the estate funds. The witness for the defendant denied any misappropriation of trust as he had personal knowledge of the trustee's dealings. The defendant put forward a plea of limitation as the monies claimed was from 1992 onwards.

Held (allowing the plaintiffs' claim):

(1) The plaintiffs proved the sum claimed by producing entries from the accounts that indicated that monies were utilised by the trustee for his personal benefits. The plaintiffs' witnesses had personal knowledge of the transactions pertinent to the estate funds and were able to produce documents in support thereof. (para 19)

(2) The defendant had submitted that the accounts were altered and rewritten. However, this was not pleaded in the statement of defence. The defendant had also failed to cross examine the plaintiffs' witnesses on the matter. Thus, their submission was not taken into consideration. (paras 21-24)

(3) The trustee had deposited the estate monies into a bank account containing his personal savings. This was sufficient evidence of misappropriation of the trust monies. Further evidence by the plaintiffs was not necessary. (para 26)

(4) Despite claiming to have personal knowledge of the entries in the accounts, the defendant's witness was not familiar with the same. No documents were produced to support his involvement in the trustee's affairs. Thus, his statement was not accepted as evidence. (para 30)

(5) The plaintiffs were not required to ensure that the trustees fulfil their obligation in the trust as the fiduciary liability owed by the trustee is an absolute one. Thus the issue of recklessness raised by the defendant was not relevant to the case at hand. (para 31-32)

(6) The plea of limitation was not applicable as the plaintiffs only knew about the fraud two years after the demise of the trustee. Further, due to the fraudulent nature of the case the plaintiffs' action was not time barred. (para 33-35)

Case(s) referred to:
Aik Meng (M) Sdn Bhd v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***
Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***
Koh Siew Keng & Anor v. Koh Heng Jin [2008] 3 CLJ 450 CA ***(refd)***
Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 34

For the plaintiff - Prakash Menon (Harcharan Singh with him); M/s Isharidah, Ho, Chong & Menon
For the defendant - V Kumaresan; M/s Salehuddin Saidin & Assoc

Reported by Melinda Robert

JUDGMENT

Zura Yahya JC:

[1] The plaintiffs in this action are the beneficiaries of trusts of the moveable and immovable properties comprised in the estate of one Haji Abdullah bin Mohd Zin. This Trust, has been administered by one Zulkifli bin Haji Abdullah until his demise on 20 December 2000. The estate of Zulkifli bin Haji Abdullah is being administered by the defendant pursuant to Letters of Administration granted under the Ipoh High Court Petition No. 31-65-2004.

[2] Plaintiffs claimed that the sum of RM315,716.90 was monies due and payable to them under the trust for the years 1992 to 2003. This sum was known after they caused the accounts of the trust for the years 1992 to 2003 to be drawn up. Thus the plaintiffs are also claiming for the cost incurred for drawing up the accounts and carrying out the audit.

[3] To establish the claim, plaintiffs have called five witnesses. They were the 1st plaintiff (PW1) who is the son of Haji Abdullah bin Mohd Zin, the 17th plaintiff (PW2) who is the grandson of Haji Abdullah bin Mohd Zin, Habsah bte Sulaiman (PW3) who is the wife of the 2nd plaintiff, Zuraidah bte Salleh (PW4) the accountant who prepared the audited account, and the 2nd plaintiff (PW5) who is the son of Haji Abdullah bin Mohd Zin.

[4] Evidence of PW1 relates to the relationship amongst the plaintiffs and the late Haji Abdullah bin Mohd Zin. He mentioned about the issuance of the Power of Attorney to Zulkifli bin Haji Abdullah (the deceased) to administer the estate properties of the late Haji Abdullah bin Mohd Zin. Though a director of Syarikat Haji Zulkifli & Kaum Keluarga Sdn Bhd, he stated that he had no knowledge as to how the estate of the late Haji Abdullah bin Mohd Zin was administered.

[5] Another director of Syarikat Haji Zulkifli & Kaum Keluarga Sdn Bhd is PW5. The witness confirmed that a Power of Attorney was given to the deceased to administer the estate properties of the late Haji Abdullah bin Mohd Zin. He confirmed that PW2 was working with the deceased since 1975 and that he left the entire affairs of the estate of the late Haji Abdullah bin Mohd Zin to the deceased and PW2. Sometime in early 2003, after the demise of the deceased he was told by PW2 that the deceased owed monies to the estate. He then instructed PW3 to look into the books to examine the status of accounts and she reported to him that a sum of RM315,716.90 was due from the deceased to the estate. He subsequently lodged a claim with the Defendant (who is the administrator of the estate of the deceased) who then requested for audited accounts. He then appointed PW4 to prepare the audited accounts (exh. P19).

[6] In his evidence PW5 also explained the difference between Zulfikli Haji Abdullah & Co-owners and Syarikat Zulkifli Haji Abdullah & Kaum Keluarga Sdn Bhd. He also confirmed that yearly accounts were not prepared for Zulkifli Haji Abdullah & Co-owners in the form of Profit and Loss and Balance Sheet but merely for tax purposes.

[7] The most important witness for the plaintiffs is PW2. He worked with the deceased whereby he assisted the deceased in managing the affairs of the estate properties since 1975. He has

personal knowledge of the state of the accounts of the estate properties because his main task was to make entries of all transactions (payments in and payments out) relating to the monies of the estate properties, which he did in several Log Books, bank cash books and other books, upon instructions received from the deceased. As such PW2 during the hearing had identified specific entries in the books which showed that between 1992 and the deceased's death in 2000, the deceased utilised monies collected on the account of the plaintiffs for his own purposes or that for his wife and children. These entries can be seen in exhs. P1, P1A-D, P2, P4, P4A-C, P6, P6A-J, P7, P7A-G, P8, P8A-F, P9, P9A-E, P10, P10A-D, P11 and P11A-B. PW2 stated that the deceased had invested in Tabung Haji on behalf of the beneficiaries and returned the dividends into the estate fund except for 1998 which was paid into the deceased's personal account. Besides the investment in Tabung Haji, PW2 also gave a full account of the manner in which the estate funds were utilised for investment in Amanah Saham Bumiputra (ASB) by the deceased for his own purposes and his family.

[8] As regard to the payments made to the deceased and his family members, PW2 stated they could be seen in a book kept by the deceased called "Buku C Orang Pinjam Wang" (exh. P3). According to PW2 all the entries in this book were made by the deceased himself and he identified that the handwritings therein were that of the deceased.

[9] PW2 went on to state that income from the estates were paid into the deceased's personal account at Malayan Banking Berhad and Hong Kong Bank Malaysia Berhad. However in June 1998 the deceased's personal account in Hong Kong Bank Malaysia Berhad was closed and the balance in the account was transferred to the current account of the same bank which was operated under the deceased name and his name. In respect of these bank accounts PW2 stated that it was his responsibility to deposit and withdraw the monies upon the instruction of the deceased and to record the entries into the relevant books as instructed by the deceased. As for payment received and paid from the estate fund, PW2 stated that no vouchers were issued.

[10] For tax purposes, the income of the estate was reported to the tax department as "Zulkifli Haji Abdullah & Co-owners". The report for this purpose was prepared by M/s H C Wong & Chew

Chartered Accountant during the deceased's time. PW2 denied that the yearly accounts of the estate were prepared by the mentioned accountant's firm.

[11] The 3rd witness for the plaintiffs is the wife of the 2nd plaintiff (PW5). She was requested by PW5 to examine the books belonging to Zulkifli Haji Abdullah & Co-owners to determine the status of the funds and if monies were due from the deceased to the beneficiaries.

[12] In her evidence, PW3 mentioned about her qualifications. As to her working experience, PW3 stated that up to 1997 she was an accounts officer and after that she had provided accounting services to several companies on a free-lance basis.

[13] PW3 stated when she examined the account books of Zulkifli Haji Abdullah & Co-owners she was given access to 11 log books for the period of December 1991 to December 2000, Buku C - "Orang Pinjam Wang" (exh. P3), two (2) cash books (ID15A and B) in respect personal current account at Malayan Banking Berhad, one cash book together with bank statement in the personal current account of the deceased at Hong Kong Bank Malaysia Bhd (ID16A), one cash book together with bank statements in respect of a current joint account of the deceased and PW2 at Hong Kong Bank Malaysia (ID16B), bank statements in respect of the current joint account of the deceased and PW2 at Hong Kong Bank Malaysia Bhd for period July 1998 till December 2000, one file referred as "ASB Keluarga Zulkifli Haji Abdullah bin Haji Abdullah Tahun 1983 hingga 2003" and 3 books referred "Waris-waris Pinjam Wang Bulanan" for the period 1991 to 2000. From all these books PW3 had extracted entries showing payments out by the deceased to himself, his family and for investment in ASB and repayment by him and his family. During the hearing PW3 had identified the details of the entries in the accounts by cross referring to the source documents. PW3 stated that she had sight of all documents but not vouchers as there were none. She also stated that although there were no signatures for payments to some of the deceased's children, there were letters of acknowledgement signed by them as seen in 'Buku C'. As the result of the examination of the books PW3 found that the deceased owed the plaintiffs a sum of RM315,716.90.

[14] PW3 stated that she took six months in 2003 to examine the accounts of Zulkifli Haji Abdullah & Co-owners and she had invoiced and was paid a sum of RM22,500 for her services. She also stated that no accounts were prepared for Zulkifli Haji Abdullah & Co-owners during the period 1992 to 2000 except for submission for tax purposes.

[15] The 4th witness for the Plaintiffs was the accountant who prepared the audited accounts of Zulkifli Haji Abdullah & Co-owners (exh. P19). PW4 stated that she prepared the audited accounts by using the working papers prepared by PW3, examined the books and files of Zulkifli Haji Abdullah & Co-owners and cross-referred to source documents. Henceforth PW4 confirmed that the amount due from Zulkifli Haji Abdullah's estate is RM315,716.90. As for her fee PW4 stated it was charged as per the scale set by the Institute of Accountants.

[16] The sole witness for the defendant is the son of the deceased. In his witness statement, DW1 states that he has personal knowledge of the case and that he assisted the deceased in the affairs of the estate and the deceased was the person who made entries into the books which were kept by PW2. DW1 does not agree with the audited accounts as he was not given access to the books despite having requested for them from PW2 and PW5. According to him the yearly accounts for the estate between 1992 and 1995 were prepared by M/s H C Wong & Chew. Lastly he denied that the deceased ever misappropriated monies from Zulkifli Haji Abdullah & Co-owners and he denied borrowing money from the estate.

[17] In cross-examination DW1 stated that when payment was made to the beneficiary it would be recorded in Buku 3 by the deceased and he confirmed that this Buku 3 was exh. P2. When he was referred to the specific entries at the relevant pages in exh. P2 and was asked whether there was any recording at the entry regarding the borrowing by the beneficiaries, he stated that it was not recorded. Then he went on to say that there was no recording because the entries there were not true and the content in Buku 3 had been altered. When asked for proof, DW1's reply was that in Buku 3 there were writings which were clear and some were not clear, some entries had been blanco and rewritten. According to him these were done by PW2, PW3 and

PW5. As to the other books and documents which PW3 relied on when examining the accounts of the estate, DW1 was not able to show any alterations except for an entry marked as P8A. However DW1 confirmed that the handwriting that appeared before and after the said entry were the same. When questioned further about the alterations done by PW2, PW3 and PW5, DW1 stated that the alterations were in respect of the handwriting of other entries which plaintiffs had not referred to.

[18] As regard to not having access to the books, DW1 stated that he had witnesses to prove that he did request for them. He also stated that he had informed the defendant about this and also about the alterations made in the books by PW2, PW3 and PW5.

[19] The main issue for determination is whether the sum claimed has been proved. This has been done by the plaintiffs through PW3 who has examined the entries in the books and also other documents as regard to withdrawals made from estate fund by the deceased for himself or for members of his family which were for their expenses or for investments in ASB, and repayments made by the deceased and/or by members of his family. Plaintiffs have also shown that PW2 has personal knowledge of the entries in the books for he has been working with the deceased since 1975 and has assisted the deceased in administering the estate. Hence PW2 was personally involved in the affairs of Zulkifli Haji Abdullah & Co-owners and is the best person who can verify what happened during the years the deceased was in charge of administering the estate. With the evidence given by PW2 and PW3, and with PW4 auditing and confirming the working paper prepared by PW3, the Plaintiffs therefore have proved the sum claimed by them.

[20] Counsel for the defendant when submitting that the plaintiffs have failed to prove the sum claimed has referred to *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 where Edgar Joseph Jr J (as he then was) had stated that "... even had the accounts books been in evidence they could not by themselves have been sufficient to charge the defendants with liability having regard to the provision of s. 34 of the Evidence Act so that the entries would have had to be proved by someone having personal knowledge of the transactions reflected in such entries". What happened in the said case was that the plaintiffs in proving the fact of damage and its amount had called as their witness an

accountant from a firm of accountants. This firm of accountants had been handling the business affairs of the plaintiffs for many years and the witness concerned had been involved with the auditing of the plaintiffs' accounts for several years and hence claimed he had personal knowledge of the plaintiffs' financial affairs. In the present case, the plaintiffs in proving the sum claimed not only have PW3 to testify regarding entries in the books and other documents but also the evidence from PW2 who had been assisting the deceased in the administering of the estate and had been making entries in the books as instructed by the deceased. Hence the sum claimed is based on the entries in the books and other documents as well from the personal knowledge of PW2 regarding the transactions entered into the books which were regularly kept in the course of business of administering the estate.

[21] The defendant through DW1, has taken the stand that the accounts were altered and rewritten. On this point too, learned counsel for the defendant had also referred to several passages in "Zulkifli Haji Abdullah & Co-owners Laporan Kendalian Estate dan Laporan Kewangan" (exh. D17) which mentioned about "menulis semula akaun", "penyemakan dan penyediaan semula akaun" and "Berdasarkan penyedian semula akaun".

[22] The abovementioned point cannot be taken into consideration. In the statement of defence, the defendant has not pleaded the issue. The law is clear and settled as regard to matter that has not been pleaded. (See *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42).

[23] Apart from failure to plead that the accounts have been altered or rewritten the defendant has not put to the plaintiffs' witnesses PW2, PW3 and PW5 that the plaintiffs' claim was fraudulent or fabricated. PW2 had given specific evidence as to the entries which were made in the list and marked as exhibit P14. He confirmed that they were either written by him or the deceased. No suggestion was made to him that the documents and entries listed in exh. P14 were altered or fabricated. Similarly when PW3 was cross-examined it was not suggested or challenged that her report was based on fabricated documents. Nor was she questioned about those words in the passages in exh. D17 which learned counsel for the defendant relied to support his contention that the accounts had been rewritten. Also no suggestion had been made about the alteration and rewriting of the accounts to PW5.

[24] In *Aik Meng (M) Sdn Bhd v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639, Gopal Sri Ram JCA, (as he then was) has stated:

> ... It is essential that a party's case be expressly put to his opponent's material witness when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument ...

[25] Another point raised by the defendant was the absence of the payment vouchers and payments receipts to prove each and every transaction as stated in the books of account. PW2 had stated that no vouchers were issued for any transactions and PW3 stated she was not given any vouchers when she had to examine the accounts of the estate. On the part of the defendant, no evidence to the contrary has been produced. That being the case, the non-availability of the vouchers has no effect on the correctness of the sum claimed. It is so since the sum claimed has been arrived at after PW3 as well as PW4 had verified the entries with the source documents.

[26] In the submission learned counsel had stated that no evidence had been forwarded by the plaintiffs to prove that the two bank accounts were the accounts of the estate. This submission is of no merit in view of the evidence by PW2 that those were the bank accounts in which the deceased deposited the estate monies and that Zulkifli Haji Abdullah & Co-owners did not have a separate bank account. And he also said it was true that the deceased "menyimpan akaun dengan mencampur akaun harta pesaka dan akaun peribadinya dalam satu buku akaun".

[27] As to the Amanah Saham National (ASB) accounts which were in the names of the deceased, his wife and his daughter in the course of the cross-examination of PW2 no question was asked about this matter. As for PW3, she was questioned on this. This can be seen during the cross-examination which is as follows:

Soalan : Tadi dalam keterangan utama, kamu telah memberitahu dalam Jawapan 6 di para (g) Penyata Saksi kamu iaitu fail ASB Keluarga Zulkifli – fail ini adalah fail persendirian Zulkifli Haji Abdullah dan tidak termasuk dalam dana estet – setuju?

Jawapan: Saya setuju.

[28] Although from the above question and answer, PW3 had agreed that it was a personal file of the deceased and did not come under the estate fund, but PW3 in her evidence had also showed through the entries in the books that the deceased had taken out monies from the estate fund to invest in the ASB for himself and for members of his family.

[29] DW1 had stated that yearly account for Zulkifli Haji Abdullah & Co-owners were prepared for the years 1992, 1993, 1994 and 1995 by a firm of accountants known as H C Wong & Chew, Ipoh, Perak. However, he did not produce any of the yearly accounts nor the accountant from the said firm of accountants was called as a witness. Learned counsel submitted that it was the plaintiffs who ought to call the said accountant since PW2 had testified that the said firm of accountants had prepared the yearly accounts. From the evidence given by PW2 it can be seen what was submitted by learned counsel is incorrect. PW2's evidence is that the said firm of accountants prepared the accounts of Zulkifli Haji Abdullah & Co-owners for the purpose of income tax submission. That being so the burden is on the defendant to call the accountant as their witness to show there were yearly account for Zulkifli Haji Abdullah & Co-owners.

[30] DW1 had all along testified that he had personal knowledge of all the affairs of Zulkifli Haji Abdullah & Co-owners. However, during the cross-examination it had been shown that he was not familiar with the entries in the books which were kept in the course of the business of the estate. He had also admitted he had no documentary evidence to support his involvement in the affairs by Zulkifli Haji Abdullah & Co-owners. In the light of the evidence adduced during the cross-examination, I am not able to accept DW1's statement that he had personal knowledge of the affairs of Zulkifli Haji Abdullah & Co-owners.

[31] Another matter raised by the defendant was that the plaintiffs were reckless in that they failed to make proper inquiries about the monies and accounts of the estate to the deceased during his life time. The evidence before the court was that PW5 had about three or four times inquired about the general affairs of the estate since the inception of Syarikat Haji Zulkifli Abdullah dan Kaum Keluarga Sdn Bhd in 1995. According to this witness, the deceased told him "Jangan bimbang" and he (ie, deceased)

managed everything. In the submission learned counsel for the defendant stated that the reasons given by PW5 for not pursuing his interest in the estate were not acceptable. As for PW2 counsel submitted that since he was with the deceased at all time and claimed to have personal knowledge of the transactions in question but had chosen to inform PW5 of the misappropriation of the estate funds by the deceased in late 2002 when the deceased's children approached him for money from the estate showed his as well as the other plaintiffs' attitude towards the estate that they had all the opportunity to inquire during the life time of the deceased yet failed to do so.

[32] The issue of recklessness as mentioned above is not relevant. It is so since the relationship that existed between the deceased and the plaintiffs was one of trustee in creation by virtue of the Power of Attorney given to him by the plaintiffs who are the beneficiaries. The deceased thus owed a fiduciary duty to them. This fiduciary liability of the deceased to the plaintiffs who are all the beneficiaries of the estate is absolute and they do not have to watch over him (ie, the deceased) on his management and the administering of the estate.

[33] Defendant also contended that plaintiffs' claims were time barred by the Limitation Act 1953. This was because the plaintiffs' claims mainly included transactions in the years 1992, 1993, 1994, 1995, 1996, 1998 and 1999. Counsel for the plaintiffs in reply to this contention submitted that the issue of limitation was a non-starter. Counsel pointed out that from the evidence adduced, plaintiffs only knew about the misappropriation of the estate fund after the demise of deceased and this was not immediately but two years later after the plaintiffs (specifically PW2) came across "Buku C Orang Pinjam Wang" (exh. P3) which had entries about monies taken out by the deceased for personal use.

[34] The case of *Koh Siew Keng & Anor v. Koh Heng Jin* [2008] 3 CLJ 450 was referred by learned counsel for the plaintiffs. In the said case Court of Appeal has held:

> Though the respondent was neither a constructive trustee, nor a trustee under a resulting trust, as an executive and personal representative of the testator's estate he fell within the broader definition of "trustee" given by the Trustee Act 1949. There was no doubt that he converted to his own use monies not belonging

to him. Therefore, s. 22(1)(b) of the Limitation Act 1953 ("the Act") applied and the plea of limitation failed. Further, s. 22(1)(a) of the Act would also apply equally to the facts of the case. The appropriation by the respondent of monies he knew belonged to the testator amounted to the very least to equitable fraud or unconscionable conduct. The respondent having committed a fraudulent breach of trust (having regard to the wider definition of trust), no period of limitation would apply.

[35] In the present case, the deceased been the Administrator of the Estate and with the Power of Attorney given to him, he was thus a trustee of the plaintiffs. During the hearing Plaintiffs have established that the deceased had appropriated monies from the estate fund for his own use and members of his family. That being the case the defendant's plea of limitation must fail.

[36] For all the reasons given, I find that the plaintiffs have prove their case on the balance of probabilities. Accordingly the plaintiffs' claim is allowed in respect of prayer (a) which is for the sum of RM315,716.90 together with interest thereon at the rate of 8% per annum from 1 January 2004 until date of full payment, and prayer (b) which is for the sum of RM51,000 being the costs incurred for the drawing of the accounts and the audit together with interest thereon at the rate of 8% per annum from the date of filing the writ until date of full payment. Costs is also awarded to the plaintiffs.